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SOME RECENT CRITICISM

OF

GELPCKE VERSUS DUBUQUE.

PART II.

B. The decision was based on the theory that the state courts' reversal of interpretation of the statute was a law impairing the obligation of contracts.

The purpose of the preceding section will become more evident as we proceed. We have attempted to show, and it is believed that it has been shown, that in cases involving statutory construction, the federal courts have acknowledged their duty to adopt the judgment of the state court as final.

It has often been said, however, that *Gelpcke* v. *Dubuque* and kindred cases form an exception to that rule. On principle it is clear that *Gelpcke* v. *Dubuque* must be justified, if at all, on one of three grounds:

(1) On the theory that the federal courts are not bound to follow state constructions.

(2) On the theory that the rule, as above laid down, exists, but that there is an exception, for some occult reason, in the case of contracts.

(3) On the theory that a federal question was involved. If the decision can be explained, without adopting one of these views, we are unable to comprehend that explanation.

The foregoing section has proven that the first view is untenable, even if it had ever been urged. We believe that the same principle, as there investigated, renders impossible the second view. It is not necessary here to further elaborate on the principle as discussed in the latter part of the preceding section. As there stated, the federal courts, either have, or have not, the right to construe state statutes. If they have not, and we have shown that they have not, then, where the power does not exist, no "exceptions" can arise. This on principle seems plain. But, it is said, the federal courts have made an exception. This, however, begs the question. In the first place, it is not a legitimate argument for the correctness of a principle discussed on *a priori* grounds, to cite a decision; and, in the second place, it is yet to be demonstrated that these cases were decided on that principle.

All text writers who advance the "exception" theory, declare, at the same time, that the theory is unsound. This brings us to the conclusion towards which all the argument so far has been directed. *Either Gelpcke* v. *Dubuque is a wrong decision, or else it involves a federal question.* Having on principle reached this conclusion, we proceed to find out what was, in fact, the basis of the decision.

Ever since the case was decided, text writers have been advancing theories upon which, in their opinions, the case was rested. Professor Thayer, in an article in the *Harvard Law Review*[1] upholds the decision, but places it upon the ground of *bias*. That is, he says, where the federal courts have reason to believe that the state courts have been partial in administering the state law, they can, themselves, entirely disregard the state law. This seems to be a remarkable conclusion. As Professor Thayer, himself, says, one reason for establishing the Circuit Courts, was to provide an impartial tribunal wherein the *law of the state* should be administered;

[1] 4 Harv. Law Rev., 311 (1891).

and yet in order to administer impartially that *law of the state*, the federal courts may entirely disregard it, and administer some other law, for it must be conceded that the decisions of the state court are what, within the thirty-fourth section of the Judiciary Act, do constitute the law of the state. From the standpoint of at least one of the parties, who has a legal right to have the law of the state applied to his case, this would scarcely seem to be a notable instance of impartiality. To allow such a latitude as this, in the case of "bias," would be to give the federal courts an unlimited right to disregard state laws whenever they see fit to do so. With the greatest respect for the eminent writer, it is submitted that the decision cannot be supported upon this theory, and there is no ground for believing it to have been the basis of the court's opinion.

Hon. Henry Reed, in his article entitled "The Rule in Gelpcke *v.* Dubuque,"[1] makes an exhaustive examination of the cases, and ends by declaring *Gelpcke* v. *Dubuque* to be an anomalous case, which is unknown elsewhere in the law. He does not seek the principle upon which it was founded, but contents himself by saying that the decision was just, has not been overruled, and was made necessary by peculiar circumstances. This may be a satisfactory conclusion to the utilitarian, but is certainly most disappointing to a student of law. The fact that the decision is just, should lend additional diligence to the search for its underlying principle, but of itself is not a sufficient answer to legal objections to its soundness.

Professor Pepper, in his book above referred to, seems to think the decision recognizes an exception to the duty of the federal courts to "follow," and therefore questions its soundness.

Mr. William B. Hornblower[2] and Mr. Conrad Reno,[3] in two well considered articles, support the case on the theory that it involves a federal question.

[1] 9 Am. Law Rev., 381 (1871).
[2] 14 Am. Law Rev. 211.
[3] 23 Am. Law Rev. 190.

Mr. William H. Rand, Jr.,[1] places the decision upon the same ground, but intimates his opinion that it cannot be supported.

Professor Patterson says that under the word "law," as used in the federal clause forbidding states to impair the obligation of contracts, is included "judicial decisions of state courts of last resort, rendered subsequently to the making of the contract in question, and antecedently to the suit in which the court determines the invalidity of the contract, and altering by construction the constitution and statutes of the state in force when the contract was made,"[2] citing *Gelpcke* v. *Dubuque*.

Mr. Cooley also places the decision on the ground that the federal clause was violated.[3]

The case is referred to without comment in a note to Story on the Constitution.[4] No reason is given for the conclusion reached therein.

Hon. J. I. Clark Hare, however, gives a careful discussion of the entire series of cases represented by *Gelpcke* v. *Dubuque*, and clearly intimates his opinion that the case was decided on the theory that the state courts' decision was a "law" within the meaning of the federal clause.[5]

Enough has been said to show that text writers generally, certainly all whose works are recognized as standard authorities, concur in the opinion that the decision in *Gelpcke* v. *Dubuque* was founded on the theory that a federal question was involved. But however much we may prize the opinions of writers, after all the best source of knowledge is the case itself, and the comments upon it in later opinions of the same court.

Mr. Justice Swayne delivered the opinion. His language has been the subject of much adverse comment. It must be conceded that the learned justice leaves much to be desired. However, if his opinion be examined with a view to discover-

[1] 8 Harv. Law Rev. 328.
[2] Federal Restraints on State Action, pp. 146–147.
[3] Cooley's Principles of Const. Law, p. 312.
[4] Vol II, pp. 575–576.
[5] Hare's American Const. Law, pp. 721–726.

ing the underlying principle which was in the mind of the court, it is thought that the examination will not prove so unsatisfactory as at first appears. In the first place, we must assume that the rule that the federal courts are bound to follow the state courts' construction of their own laws, was present in the mind of Mr. Justice Swayne. The strongest proof of this is the language of Mr. Justice Miller, dissenting. He says, "The general principle is not controverted by the majority, that to the highest courts of the state belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the state court, that this court is bound to follow it." Further, he calls attention to the language of Mr. Justice Swayne in the case of *Leffingwell* v. *Warren*,[1] which was decided at the next preceding term of court. In that case Mr. Justice Swayne says, "The construction given to a state statute by the highest judicial tribunal of such state, *is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.* . . . If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications." No language can be more clear or explicit than this. It is impossible to believe that Mr. Justice Swayne could have overlooked this principle in preparing his opinion. We assume that it was in his mind at the time. He must have grounded his decision upon a well defined exception to the rule, or upon the theory that the state court's decision violated a federal clause.

It may here be parenthetically remarked that Mr. Justice Miller's suggestion that the court were influenced in their decision, because they considered the state construction to be unsettled, will not bear examination. Mr. Justice Swayne, on page 205, says it is unnecessary to decide whether the construction was or was not settled, as the point was not

[1] 2 Black, 599.

material. It could not, therefore, have been the basis of the decision.

We return to the proposition just stated. The decision must have rested upon a federal question, or upon a well defined exception to the rule. Nowhere in the language of the court is there a suggestion of an exception to be engrafted upon the principle that the federal courts are bound to follow the construction of the state courts.

The first half of the opinion is devoted to a discussion of the legality of the state legislation. It has been suggested that the excitement and unrest, during the time of the Civil War, was largely responsible for the decision in this case. That it was a violent reaction from the doctrine of States' Rights which was at that time being pressed so disastrously by the states of the South. This may have been, to a great extent, true. This may have been the primary cause for the discussion of a clearly irrelevant question, in the early part of Mr. Justice Swayne's opinion. That it was irrelevant, and that Mr. Justice Swayne knew it was irrelevant, seems to be very clear. Perhaps he desired to administer a rebuke to the state for attempting to evade its obligations by a construction so palpably wrong as to be in conflict with the law of "sixteen other states," but that he intended to make that fact the ground of his decision, it is impossible to believe.

Mr. Justice Swayne, as we have pointed out, in a case just previous to *Gelpcke* v. *Dubuque*, clearly demonstrated his belief in the duty of the federal courts, as a matter of obligation, to follow the state courts in cases precisely similar to the one at bar. Is it conceivable that he had so soon forgotten the rule he there laid down, and now, as Professor Pepper says, "was assuming to administer not the law of Iowa, but the law of sixteen other states?" It cannot be denied that there is room for this criticism, because the opinion undoubtedly does remark upon the soundness of the former decisions, as contrasted with what is said to be the unsoundness of the latter. It is insisted, however, that this discussion was given merely for the purpose of exposing the intentions of the state, and not as a legal reason for the decision. A manifest error

in paragraphing tends to substantiate the criticism. In the report on p. 206, Mr. Justice Swayne closes his remarks concerning the erroneous character of the late Iowa decision. His closing sentence is placed at the beginning of the following paragraph, which deals with the question of the *effect* to be given to the state decisions by the Supreme Court. The last sentence in the preceding paragraph is, "Many of the cases in the other states are marked by the profoundest legal ability." This should be followed directly by the opening sentence in the following paragraph: "The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety." The court then begins an entirely different subject, and the one which involves the real principle of the case. It is not surprising that the second sentence in this paragraph should have been thought to be a sequence of the first, quoted above, but the subject matter of the two being entirely different, and there being no connecting words, it seems clearly to be an error of the transcriber. The next paragraph, as it should be arranged, and which in our opinion embodies the real ground of the decision whether right or wrong, reads as follows: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true rule is, that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts, altering the construction of the law.* The same rule applies where there is a change of judicial decision, as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

Whatever may be said of the ambiguity of some portions of Mr. Justice Swayne's opinion, certainly such a criticism

cannot be applied to this paragraph. It is clear and emphatic. If the opinion had consisted of this alone, it would no doubt have received much less censure than it has.

Gelpcke v. *Dubuque* has been followed by a long line of cases in the Supreme Court. The principle uniformly adopted as the one there laid down, is that when a state court has altered the interpretation of a state statute, such decision amounts to an amendment of the statute, and is, within the meaning of the federal clause, a "law," which, when it impairs the obligation of contracts, must be deprived of its force by the federal courts.[1] This is so well known that we refrain from quoting from later cases. To recapitulate, the argument hitherto may de briefly summarized as follows:

(1) *The federal courts, when administering the law of the state, are as fully bound to accept the states' courts' construction of state statutes as they are to accept the statutes themselves.*

(2) *As there is no exception to the duty of the federal court to accept the state statutes, so there is no exception to the duty of the federal court to accept the states' courts' construction of those statutes, unless a federal question is involved. Both must stand or fall together, for the courts have declared them to be of equal rank.*

(3) *Mr. Justice Swayne was fully in accord with the rule as above given, as evidenced by his opinions both before and after Gelpcke v. Dubuque.*

(4) *Gelpcke v. Dubuque was decided on the ground that the Iowa decision altering the construction of the statute was, within*

[1] Thompson *v.* Lee Co., 3 Wall. 327 (1865), Davis, J.; Havemeyer *v.* Iowa Co., 3 Wall. 294 (1865), Swayne, J.; Lee Co. *v.* Rogers, 7 Wall. 181 (1868), Nelson, J.; Butz *v.* Muscatine, 8 Wall. 575 (1869), Swayne, J.; The City *v.* Lamson, 9 Wall. 477 (1869); Olcott *v.* Supervisors, 16 Wall. 678 (1872), Strong, J.; Township of Pine Grove *v.* Talcott, 19 Wall. 666 (1873), Swayne, J.; Boyd *v.* Ala., 94 U. S. 645 (1876); Town of S. Ottawa *v.* Perkins, 94 U. S. 261 (1876); Douglas *v.* Co. of Pike, 101 U. S. 677 (1879), Waite, J.; Anderson *v.* Santa Anna, 116 U. S. 356 (1885), Harlan, J.; County *v.* Douglas, 105 U. S. 728 (1881), Waite, C. J.; Green *v.* County of Conness, 109 U. S. 104, Bradley, J.; Louisiana *v.* Pilsbury, 105 U. S. 278 (1881), Field, J.; Ray *v.* Gas Co., 138 Pa. 391 (1890), Clark, J.; Union Bank *v.* Board, 90 Fed. 7 (1898); Louisville T. Co. *v.* Cincinnati, 76 Fed. 296 (1896); Loeb *v.* Trustees of Ham. Co., 91 Fed. 37 (1899).

the meaning of the federal clause, a "law," which impaired the obligation of contracts, and which the federal courts might refuse to apply for that reason.

SECTION III.—THE DISSENTING OPINION OF MR. JUSTICE MILLER.

Having reached the conclusion as to the basis of the decision in *Gelpcke* v. *Dubuque*, it remains to examine the correctness of that principle. Before taking up that phase of the subject, it may not be inappropriate to briefly refer, at this point, to some of the objections which have been raised to the decision. For the purposes of this paper, we may roughly divide all these objections into two classes:

(1.) Objections to the statement that a judicial decision may be a "law," when it construes a state statute.

(2.) Objections which have been raised to any other theory of the case, among which are the "exception" and "bias" theory.

If the argument heretofore is able to stand the test of investigation, we may disregard the second class of objections, because we have shown that the case was not decided on any of those principles. This paper would be incomplete, however, and its conclusions not well established, did we not give some space to a more careful examination of that which is the ground-work of nearly all later argument against the principle of this case, the famous dissenting opinion of Mr. Justice Miller.

Mr. Justice Miller's argument seems to assume that the court had recognized an exception to the rule that the federal courts must adopt the state courts' construction of their own laws. Most of his criticism, therefore, is levied at the "exception" theory. In all of that criticism we fully concur, because, as we have tried to show, there can be no exception to the rule. It must stand or fall in its entirety. That Mr. Justice Miller did not consider the case to be founded upon a constitutional question would appear from the nature of his criticism, but nevertheless, that he did recognize to some extent, at least, this view of the case, unmistakably appears from a careful perusal of his opinion, as we shall try to show later.

He points out that the majority of the court do not controvert the principle "that to the highest court of the state belongs the right to construe its statutes and its constitution, *except where they may conflict with the Constitution of the United States, or some treaty or statute made under it.*" After having made this clear statement, he proceeds to prove it by quoting from former opinions of the justices who composed the majority. Then, in the next breath, he declares that the majority do controvert the principle which he has just said they do not. It will be noted that the only exception which Mr. Justice Miller declares the majority recognize, is where the statute or constitution of the state violates the federal constitution. In the following paragraph he says: "But while admitting the general principle, the court say it is inapplicable because there have been conflicting decisions" in the state. This is the first reason which he conceives the majority gave. That this is an incorrect statement of the majority's conclusion appears by this language taken from Mr. Justice Swayne's opinion, page 205: "Whether the judgment in question can, under the circumstances, be deemed to come within that category ('the latest settled adjudications') it is not now necessary to determine."

In the same paragraph (p. 210) Mr. Justice Miller gives what he thinks was the second reason that induced the majority to decide as they did. He speaks of the "moral force" of the proposition, and continues, "And I think, taken in connection with some *fancied duty of this court to enforce contracts* over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule, which in my opinion cannot be justified either on principle or authority." What that principle is, Mr. Justice Miller nowhere in his opinion states more definitely than here. But whatever he conceived it to be, it must have been an "exception," other than the only one which, he had just carefully proven, the majority entertained, if we concede that he did not recognize a federal question to be the basis of the decision.

That these vague reasons form a very unsatisfactory explanation of the court's decision must be apparent to every one It seems little short of a contradiction for the eminent dissenting

justice to say that no exception save where a federal question was involved was recognized, and immediately to give as the basis of the decision of that court, a very indefinite reason for granting an exception other than that one.

He also seems inconsistent in another part of his opinion. On pages 208–209 he says, "Yet this is in substance what the majority of the court have decided. They have said to the Federal Court sitting in Iowa, 'You shall disregard this decision of the highest court of the state on this question. Although you are sitting in the State of Iowa and administering her laws, and construing her constitution, you shall not follow the latest, though it be the soundest, exposition of its constitution by the Supreme Court of that state, but you shall decide directly to the contrary, and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. Where it says bonds are void, issued in the state, because they violate its constitution, you shall say that they are valid, because they do not violate its constitution." It is submitted that nothing can be further from what the court actually did say than the foregoing. According to this language, which is unlimited, the federal court claimed the right to construe the constitution and statutes of the state whenever it should choose to do so. The court distinctly disclaimed such a right, as Mr. Justice Miller, himself, had previously pointed out. What the court did do, and all that they did do, was to step in and protect the bonds held by the plaintiff. To do this it was not necessary to arrogate to themselves the right to dictate to the state what her laws should be; all they said was, "*you shall not in this case apply a statute or a construction of a statute which impairs the obligation of this contract.*" The court distinctly say, "However we may regard the late case in Iowa as affecting the future, etc., etc.," thus plainly intimating their inability to interfere in any way with the rights of the state court.

That Mr. Justice Miller really recognized the truth of these observations, appears from a sentence from his opinion, on page 216: "In the present case, the court rests on the former decision of the state court, *declining to examine the*

constitutional question for itself." How does this sentence comport with the one quoted above, where he declared that the court by its decision had given the federal court sitting in Iowa the right to decide that bonds were valid "because the state statute was constitutional," that is because the federal court thought, contrary to the state court, that it was constitutional? It is one thing to claim a right to interpret a law for a sovereign state, and to force that law upon that state, a thing which, as Mr. Justice Miller points out, cannot be done; it is quite a different thing to say to the state court, "Construe your statutes as you will, and as is your undoubted right, but when you attempt to *apply* that construction, so that it impairs the obligation of contracts, we, by virtue of the federal constitution, claim the right to forbid you."

That Mr. Justice Miller really knew this to be the attitude of the court, is apparent from the fact that while mainly combatting what he thought to be the necessary principle of the decision, the "exception" theory, yet at the same time he advances at least two arguments against the "federal" theory.

On pages 210–11 he declares that there can be no question of the impairment of the obligation of contracts, because here the court is called upon "to determine whether there ever was a contract made in the case," not to enforce a contract whose existence was undisputed. This objection will not bear investigation. It assumes that the Iowa decision had a retroactive effect, which is the very point at issue.

The next objection which, without naming it, Mr. Justice Miller raises to the "federal" theory of *Gelpcke* v. *Dubuque*, is that a judicial decision cannot be a law; thus, on page 211, he says, "The decision of this court contravenes this principle (*i. e.*, that courts only interpret the law) and holds that the decision of the court makes the law, and in fact the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid." This last sentence is plainly inconsistent with the sentence of Mr. Justice Miller above quoted, where he declared in general terms that

the federal courts claimed the right to construe the Iowa statutes. Here he recognizes the scope of the decision to be limited to the protection of this contract, by virtue of the fact that it had been entered into before the decision of the Iowa court, which by applying a changed construction of the statute, impaired its obligation.

By the objection last referred to, Mr. Justice Miller has touched the principle upon which *Gelpcke* v. *Dubuque* must stand or fall. It is not proposed to discuss it here. His language is quoted to show that he, too, recognized the ground of the decision to be that, in the opinion of the court, a judicial decision can be a "law" within the meaning of the federal clause, when it enters into and becomes part of a statute. Mr. Justice Miller, however, persistently refused to recognize in terms that the court decided the case on this theory. The entire tenor of the court's opinion was distasteful to him, as he very plainly shows by his language, and as the thought that the federal courts could usurp state rights affected him most strongly, he dealt mainly with that view. Almost at the end of his opinion he says, "I think I have sustained by this examination of the cases, the assertion made in the commencement of this opinion, that the court has, in this case, taken a step in advance of anything heretofore decided by it on this subject. That advance is in the direction of a usurpation of the right which belongs to the state courts, to decide as a finality upon the construction of state constitutions and state statutes. *This invasion is made in a case where there is no pretense that the constitution, as thus construed, is any infraction of the laws or Constitution of the United States.*" Side by side with this last sentence we will place, at the risk of repetition, a sentence from the opinion in which Mr. Justice Miller says there is no "pretense" that a federal clause had been encroached upon: "The sound and true rule is, that if the contract when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation, or decision of its courts altering the construction of the law. The same

principle applies where there is a change of judicial decision, as to the constitutional power of the legislature to enact the law. To this rule thus enlarged we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

On the whole, Mr. Justice Miller's dissenting opinion leaves much to be desired. He does not plainly state what he considers to be the basis of the decision, but contents himself with a vigorous if not entirely connected dissent to the whole opinion. The chief source of dissatisfaction, however, lies in the fact that he attacks not the principle upon which the court actually based its opinion, so much as he attacks another principle which he thinks must have been the basis of the decision, but which, it is submitted, was not and could not have been.

If the contention as to what the underlying principle of the case is has been established, then Mr. Justice Miller's opinion is not pertinent except in so far as it deals with the question of judicial legislation.

SECTION IV.—EXAMINATION OF AUTHORITIES FOR THE PRINCIPLE INVOLVED.

In the discussion of the correctness or incorrectness of the principle, which we have shown to be the foundation of *Gelpcke* v. *Dubuque*, we propose to proceed first, by examining the authorities, and secondly, by an investigation on *a priori* grounds.

Before beginning an examination of the cases, let it be remembered that this paper deals not so much with the question of the soundness or unsoundness of *Gelpcke* v. *Dubuque* as viewed in the light of the decided cases of that day, as with the recent criticism of the position there assumed. We therefore claim the right to examine all cases bearing on the subject, even *Gelpcke* v. *Dubuque* itself and kindred cases, in order to throw light upon the attitude which the courts have taken.

In the first place, the courts have declared that

A. The judicial construction of a state statute becomes a part of the statute, as much so as if incorporated into the text.

This expression has been so often used by the courts that it scarcely needs to be supported by decisions. It has been assumed by some text writers and by some judges that the courts do not mean what they say by this statement. It is said that to give it a literal meaning, would be to give to a decision the force of a law. Feeling fearful of the consequences, should such a conclusion be established, the writers and judges were driven to the result just mentioned, *i. e.*, to say that when the courts have plainly said one thing, they mean something else. Whether the consequences of adopting the heretical doctrine that a judicial decision may be a law, would be so appalling as is feared by some eminent authorities, we shall not discuss at this point. The task now before us is to prove that the courts have laid down the rule as stated.

We have already proven that the federal courts are bound to follow the construction of the state courts in cases involving statute law. We have also shown that they receive the construction as a part of the statute. All that is necessary at this point is to refer again to the language used in some of those cases, with the idea of emphasizing the thought, that the construction does actually become a part of the statute law.

In *Elmendorf* v. *Taylor*,[1] Mr. Chief Justice Marshall says, "We receive the construction given by the courts of the nation (*i. e.*, the state courts) as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute." Here he plainly intimates his belief that the statutes and the construction are equally binding.

In *Green* v. *Neil's Lessee*,[2] Mr. Justice McLean said, in the course of his opinion, "If the construction of the highest judicial tribunal of the state *form a part of its statute law as*

[1] *Supra*, p. 479.
[2] *Supra*, p. 481.

much as an enactment of the legislature, how can this court make a distinction between them?"

In *Shelby* v. *Guy*,[1] Mr. Justice Johnson uses the following language: "Nor is it questionable, that a fixed and received construction of their respective statute laws in their own courts, *makes in fact a part of the statute law of the country*, however we may doubt the propriety of that construction."

In *Christy* v. *Pridgeon*,[2] Mr. Justice Field says, "If, therefore, different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretation, so far as it is a rule for our action, *a different law in one state from what it is in another.*" That is, the action of the court changes the law since both acts are identical in language.

In *Leffingwell* v. *Warren*,[3] Mr. Justice Swayne says, "The construction given to a statute of a state by the highest judicial tribunal of such state, *is regarded as a part of such statute*, and is as binding upon the courts of the United States as the text."

In *Walker* v. *State Harbor Commissioners*,[4] the court say, referring to a state court's construction: "Whatever may be our opinion as to its original soundness its interpretation is accepted and *it becomes a part of the statute as much as if incorporated into the body of it.*"

In *Webster* v. *Cooper*,[5] the court, referring to the construction of the Constitution of Maine by its State Supreme Court, say, "*this court receives such a settled construction as part of the undamental law of the state.*"

These carefully worded expressions of the courts, if they mean anything at all, must mean that the judicial construction of state statutes is in fact a part of the law of the state. But while not expressly contradicting the principles as here laid down, the courts have, in certain classes of cases, been accustomed to ignore them. It is submitted that if this view as

[1] 11 Wheat. 361 (1826).
[2] 4 Wall, 196 (1866), Field, J.
[3] *Supra*, p. 533.
[4] 17 Wall, 648 (1873).
[5] 14 How. 488 (1852).

expressed so insistently by the courts be correct, then in later decisions they have no right to disregard it. If this view of the *status* of judicial construction be unsound, then the courts should have the courage to say so and put an end to the controversy at once.

Having satisfied ourselves that the courts have laid down the rule as above stated, we will now proceed to examine cases where

B. The courts have, in fact, treated the judicial interpretation of state statutes by state courts, as being the law, not merely the interpretation of the law.

The best known group of cases which support the statement just given, is, obviously, that class of which *Gelpcke* v. *Dubuque* is the type. As these cases are all very similar in the facts involved, a few general observations may be made which will apply equally to all. In the first place they are all cases which originated in the circuit courts, jurisdiction being obtained by virtue of diverse citizenship. In the second place, in each of this line of cases, a statute previously adjudged valid by a state supreme court had been held void by the same tribunal. This question was squarely in issue. Can rights be acquired under a statute afterwards declared to be void? The courts uniformly answered the question in the affirmative provided a state court had previously held the act valid. They also said, that when those rights thus acquired, were contract rights, the federal courts would protect them by virtue of the clause in the Constitution of the United States, forbidding a state to pass a law, impairing the obligation of contracts.

One of the earliest cases to follow *Gelpcke* v. *Dubuque* was *Havemeyer* v. *Iowa Co.*[1] That case came before the Circuit Court of the United States for the District of Wisconsin, and the court being divided, was brought to the Supreme Court of the United States under the Act of Congress of April 29, 1802. The legislature of Wisconsin passed an act authorizing counties to issue bonds. The executive department

[1] 3 Wall, 294 (1865), Swayne, J.

classified the act as a local act, which took effect from the date of its passage. This view was affirmed by the Supreme Court of Wisconsin. By later decisions the Supreme Court of Wisconsin decided that this act was general in nature, was not effective until published, and that the bonds in question which had been issued before publication, were void. The Supreme Court of the United States, following and approving *Gelpcke* v. *Dubuque*, declared that the obligation of the contract should be protected, although the Supreme Court of Wisconsin could construe their laws as they pleased. The court unanimously speaking through Mr. Justice Swayne, say these decisions "being long posterior to the time when the securities were issued, they can have no effect on our decision and may be laid out of view. We can look only to the condition of things when they were sold. That brings them within the rule laid down by this court, in *Gelpcke* v. *City of Dubuque*. In that case it was held, that if the contract, when made, was valid by the constitution and laws of the state, as then expounded by the highest authority whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation. This rule was established upon the most careful consideration. We think it rests upon a solid foundation, and we feel no disposition to depart from it."

Two more cases very similar both in facts and decision followed *Havemeyer* v. *Iowa Co.* during the next three years: *Thompson* v. *Lee Co.*,[1] and *Lee Co.* v. *Rogers*.[2] Mr. Justice Davis delivered the opinion in the former and Mr. Justice Nelson in the latter, with no dissent in either case.

Shortly after this came the unfortunate decision in *Butz* v. *City of Muscatine*.[3] In this case an act had been passed by the legislature of Iowa authorizing the issuance of certain bonds. Before any judicial decision as to the validity of the statute, as far as appeared, the bonds in question were issued. A subsequent decision of the Supreme Court of Iowa de-

[1] 3 Wall, 327 (1865), Davis, J.
[2] 7 Wall, 181 (1868), Nelson, J.
[3] 8 Wall, 575 (1869), Swayne, J.

clared the act unconstitutional. The court refused to follow the state decision, alleging that its effect was to impair the obligation of the contract. Mr. Justice Miller dissented, making use of very strong language not unmixed with sarcastic allusions to the opinion of the majority. The Chief Justice concurred in the dissent. Whether or not the other cases discussed are sound on principle, it is submitted that this decision went beyond the bounds of authority. We have examined, as we believe, most of the leading cases on this subject, and, so far as we are able to judge, no other case has taken the position taken by Mr. Justice Swayne and the majority of the court in this case. *Gelpcke* v. *Dubuque* and the line of cases following it, decide only this: That whenever a Supreme Court of a state has adopted a construction for a particular local law, such construction becomes part of the local law. The court then by changing its view, practically amends the law. Such an amendment can no more have a retroactive effect than can an amendment passed by the legislature. This limitation does not, in either case, affect the amendment as to the future. Similarly, the bankrupt laws were held valid as to the future, but not in their application to existing contracts. The court recognizes the right and the duty of the state court to change its ruling, if necessary; it merely protects existing contracts.

This is very far from saying, that one who relies on his own construction of a statute, will be protected against the consequences of his own error.

Until the state court has once acted, there can be no impairment by construction. When the law is passed, contract rights acquired under it are protected from legislative repeal. When a construction of a statute has once been made, contracts made on the faith of it are similarly protected from judicial action. That is the limitation of the doctrine.

May it not be supposed that Mr. Justice Swayne leaned in this case too far one way, perhaps to counterbalance Mr. Justice Miller, who by the vigor of his language in the dissenting opinion, conveys to us the unavoidable impression that a discussion of some warmth had been precipitated. But however

that may have been, we submit with great deference that this decision stands absolutely alone, and cannot be supported, either by reason or authority.

In *Township of Pine Grove* v. *Talcott*,[1] the facts were similar to *Gelpcke* v. *Dubuque*. Mr. Justice Swayne, in delivering the opinion, again suffers himself to discuss the question as to the constitutionality of the state statute. He carefully goes over the question as to its validity or invalidity. It is submitted that the court had no right whatever to consider this question. It would be absurd as well as intolerable to imagine for one moment that the federal court could force a state to adopt for the future a different construction from that which its courts had settled upon. The argument, that the states should be prevented from putting a palpably wrong construction upon their statutes, cannot be supported. The obligations of a state are binding only upon its conscience.[2] To say that the federal court has the right to force the state to adopt a "reasonable construction" of a law, when there is no power to prevent it from repudiating its obligations absolutely, is plainly untenable. As in *Gelpcke* v. *Dubuque*, near the end of his opinion, Mr. Justice Swayne gives expression to the real ground of the decision. He says, "The national Constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly before us, that end can be accomplished unwarrantably, no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

Douglas v. *County of Pike*[3] contains one of the clearest statements of this view that has been written. This case came up on a writ of error to the Circuit Court of the United States

[1] 19 Wall, 666 (1873), Swayne, J.
[2] Hare on Constitutional Law, Lecture XXXII.
[3] 101 U. S. 677 (1879), Waite, C. J.

for the Eastern District of Missouri. It was an action on three hundred and twenty-one coupons, detached from bonds issued by the County of Pike, Missouri. The county had been authorized, by an act of the legislature, to issue the bonds in question. This act had been repeatedly construed to be constitutional, by the highest court of the state. Long after the issuance of the bonds, another decision of the Supreme Court of Missouri held the act to be unconstitutional. Mr. Chief Justice Waite uses the following language: "The true rule is to give a change of judicial construction in respect to a statute, the same effect in its operation on contracts and existing contract rights, that would be given to a legislative amendment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, *the same in its effect on contracts as an amendment of the law by means of a legislative enactment.* So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be, when the bonds in question were put upon the market as commercial paper. We recognize fully, not only the right of a state court, but its duty, to change its decisions whenever in its judgment the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones, and ordinarily we will follow them, except so far as they affect rights vested before the change was made. . . . If the township aid act had not been repealed by the new constitution of 1875, which took away from all municipalities the power of subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; *but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing.*" Unlike the opinions of Mr. Justice Swayne in similar cases, there is here no ambiguity as to the ground of the

decision. In *Anderson* v. *Santa Anna*,[1] Mr. Justice Harlan quotes the above language of Mr. Chief Justice Waite with approval and emphatically reasserts the same doctrine.

Louisiana v. *Pilsbury*[2] came up by a writ of error to the Supreme Court of the State of Louisiana. The case came up under the 25th section of the judiciary act; the facts involved a repudiation of bonded obligations by the City of New Orleans. This had been brought about by means both of a change of construction of existing statutes, and by a later act passed by the legislature of the State of Louisiana, and which was upheld by the decision reviewed. The doctrine that states are prohibited by the federal clause from impairing the obligation of contracts by state decisions, as well as by state statutes, was carefully considered. Mr. Justice Field with no dissent delivered the opinion of the court. Beginning on page 294, the court say, "The exposition given by the highest tribunal of a state must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it."

The discussion of this line of cases would be incomplete did we not include the Pennsylvania case of *Ray* v. *The Gas Co.*,[3] decided in 1890. In this case the plaintiff in error claimed that a contract, which he had entered into, would be impaired were the Supreme Court of Pennsylvania to follow its own ruling on a question of general law and adjudge his

[1] 116 U. S. 356 (1885), Harlan, J.
[2] 105 U. S. 278 (1881), Field, J.
[3] 138 Pa. 591 (1890), Clark, J.

contract void. He based his contention upon the fact that previous decisions of the Supreme Court of Pennsylvania had taken a different view of the law, and that he had contracted on the faith of such ruling. The court refused to adopt his view. They admitted the justice of his contention in all cases where such change of decision had been a change in the construction of a statute, but denied its application in the present case, because no question of the construction of a statute was involved.

The opinion clearly points out the two classes of cases and the distinction between them. The opinion of the court was delivered by Mr. Justice Clark with no dissent. On page 590 he says, "The courts of highest authority of all the states and of the United states are not infrequently called upon to change their rulings upon questions of highest importance. In so doing, the doctrine is not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision upon the subject. The members of the judiciary can in no sense be said to make or change the law; they simply expound it and apply it to individual cases. *To this general doctrine there is one well-established exception, as follows: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute, as the text itself, and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment.'*"

The court then cites with approval *Douglas* v. *Co. of Pike*, *Anderson* v. *Santa Anna*, *Gelpcke* v. *Dubuque*, etc., and quoting at length from the opinion in *Ohio Trust Co.* v. *Debolt*, thus sums up the law: "This ruling applies, it will be observed, not to the general law, common to all the states, but to the laws of the state 'as expounded by all the departments of its government,' and it is held that contracts valid by these laws may not be impaired 'either by subsequent legislation or by the decisions of its courts altering their construction. The reference is, of course, to the statute law.'"

In addition a few cases which lay down the same principle are cited in the note.[1]

In connection with this phase of the subject, it is thought profitable to refer to another class of decisions quite similar to the one just discussed. Reference is here made to that large body of cases, where the act of the state embodies a contract made between the state and an individual. To take a typical case. The legislature of the state passes a law which confers contract rights upon an individual or upon a class of individuals. The terms of the act are complied with by these individuals, who thereby enter into a contract with the state. The state then passes another act which impairs the obligation of the contract. The State Supreme Court upholds the latter act on the ground that the former act conferred no contract rights, and since there was no contract, there could be no impairment. In such cases the Supreme Court of the United States claims the right to investigate for itself and determine whether in fact a contract exists, and then to protect the obligation of that contract from impairment. These cases are sometimes referred to as laying down the principle that the federal courts have the right to construe the state law whenever that law embodies in its terms a contract. This we believe to be too broad. In such cases the court claims the right to determine for itself whether *a contract exists;* but it does not have the right to decide as to the validity or invalidity of the act. It is submitted that while embodied in the same language, the act and the contract which it creates, are two different things. The act cannot of itself be a contract. Acceptance of its terms by those to whom the offer is made is a condition precedent. The contract is a *relation*

[1] The City *v.* Lamson, 9 Wall, 477 (1869); County of Leavenworth *v.* Barnes, 94 U. S. 70 (1876); Boyd *v.* Alabama, 94 U. S. 645 (1876); Town of S. Ottawa *v.* Perkins, 94 U. S. 261 (1876); County *v.* Douglas, 105 U. S. 728 (1881), Waite, C. J.; Green *v.* County of Conness, 109 U. S. 104, Bradley, J.; Taylor *v.* Ypsilanti, 105 U. S. 60 (1881), Harlan, J.; Union Bank *v.* Board, 90 Fed. 7 (1898); Louisville T. Co. *v.* Cincinnati, 76 Fed. 296 (1896); Loeb *v.* Trustees, 91 Fed. 37 (1899); Wilson *v.* Perrin, 11 C. C. A. 66 and note (1894), Lurton, J.; Hill *v.* Hite, 29 C. C. A. 549 and note (1898), Phillips, J.

between the state and the individual. That relation the court may investigate. To hold otherwise would be to deprive the federal courts of their appellate power; for what would be easier for the state court than to declare in every instance that the contract itself being void, there could be no impairment. The federal courts, having acquired jurisdiction, always have the right to determine whether a contract in fact exists, and then to protect that contract from an impairment of its obligation; they necessarily have this power as an appropriate and necessary means of enforcing the constitutional prohibition, with which duty they are intrusted. But at the same time the question as to the constitutionality of the act upon which the contract is based, is a question into which the federal courts cannot inquire. The question of the power of the legislature to pass the act is one thing; the question as to whether it actually confers contract rights is another. It is obvious that on principle this conclusion must be reached, for how can the subject matter of an act affect the power, or rather the lack of power, of the federal courts to construe it? We have shown that the power does not exist. An incident of the subject matter of the act cannot confer it. It is believed that the cases will bear out this distinction, and it is earnestly insisted that on principle no other conclusion can be supported.

The earliest leading case of this class is *State Bank of Ohio* v. *Knoop*.[1] Ohio passed an act in 1845, by which it was provided for the organization of state banks. Among other privileges, it was provided that such banks should be allowed to pay the state six per cent. of their net profits, in lieu of taxes. "This compact was accepted, and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1837, I believe, the banks, the profession and the bench, considered this as a contract and binding upon the state and upon the banks. For more than thirty-five years this mode of taxing the dividends of banks had been sanctioned in the State of Ohio." In 1851 an act was passed, providing for the taxation of these banks. The state bank

[1] 16 How. 391 (1853), McLean, J.

of Ohio resisted payment on the ground that the later act was unconstitutional, because it impaired the obligation of its contract. The Ohio Supreme Court decided that the former act did not create contract rights, and on that ground upheld the later act. The question of the construction of the later act was in no way involved. Before we attempt to interpret the court's language, let us note exactly what questions were before it. In the first place, as we have seen, an act had been passed which offered certain immunities to state banks. The state court decided two questions:

(1) That under the constitution of Ohio, the general assembly had no power to pass such an act.

(2) That even if the act were valid, no contract rights were created by the particular relation here established between the state and the bank.

On these two grounds, either of which was sufficient, the state court held that there could be no impairment, since there was no contract.[1]

As we have pointed out, the Supreme Court of the United States has no right to consider the first question; the state court's judgment as to the validity of the state's own law, in reference to the state constitution, is conclusive. That the Supreme Court could investigate the second question, there can be no doubt. But it is plain that to reach the conclusion which they did, the Supreme Court must have decided

(1) That the law of 1845, as far as this contract, at least, is concerned, was a valid law.

(2) That a binding contract was created between the state and the bank.

That the court had the power to decide the second point is conceded. That they had not the power to decide the first question in the abstract is emphatically asserted. That in this case they had the right and the duty laid upon them to protect this contract, if one existed, is believed to be correct, but the only legitimate manner in which to do this, was to prevent the state court *in this case* from applying a later con-

[1] Debolt *v.* Ohio Life & Trust Co., 1 Ohio, 564.

struction, when the contract had been entered into upon the faith of a former construction. The question then arises, had the state court of Ohio formerly held this act valid, now construed by it to be void. We gain little or no enlightenment upon this point by an examination of the opinions in *Debolt* v. *The Insurance Co.*,[1] but from the language of Mr. Chief Justice Taney in the same case when it came before the Supreme Court of the United States, we should infer that the state court had formerly construed the act to be a valid exercise of constitutional power.[2] The same thought is conveyed by Mr. Justice McLean in the sentence quoted above, when he declares that "for more than thirty-five years this mode of taxing had been sanctioned in the State of Ohio, by the profession, the banks and the bench."

On the principle that a state construction of a state statute, or constitution, becomes a part of the law, and contract rights acquired under it cannot thereafter be divested, we can support the conclusion in this case. That Mr. Chief Justice Taney did support the case on that ground, is evident from an examination of his opinion; but Mr. Justice McLean, who delivered the opinion of the court, did not consider this point in terms. Indeed, his remarks upon the question we are discussing do not seem entirely clear. On page 390 he says, "The rule observed by this court to follow the construction of the statute of the state by its Supreme Court, is strongly urged. This is done when we are required to administer the laws of the state. The established construction of a statute of the state is received as a part of the statute. But we are called in the case before us, not to carry into effect a law of the state, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the state is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment."

[1] *Supra*, p. 554.

[2] See opinion of Taney, C. J., Grier with him, Ohio Life Ins. & Trust Co. *v.* Debolt, 16 How. at p. 431.

It will be noted here that the eminent justice declares that, in ordinary cases, the "established construction of a statute of the state is received as a part of the statute." The only construction of the state court which was under consideration, was their construction of the law of 1845. Mr. Justice McLean then continues, "But we are called in the case before us, not to carry into effect a law of the state, but to test the validity of such a law by the Constitution of the Union." What law does he refer to in this sentence? He cannot mean the law of 1851, because there was no question as to its construction before the court, and no one had thought of urging that its construction by the state court should be followed, for, as a matter of fact, the state court had not construed it. He cannot mean the law of 1845, because it could not impair a contract entered into after its passage. If the rest of his opinion were at all consistent with this view, we should say that he must have referred by "law" to the *later construction* of the act of 1845, for that was what, in reality, did impair the obligation of the contract. Indeed, by the following sentence, he declares this to be the fact: "The decision of the Supreme Court of the state is before us for revision, and if *their construction of the contract in question* impairs its obligation, we are required to reverse their judgment." He says in one sentence, "we are testing the validity of a law;" in the next he says, "we are judging the validity of a construction of a contract." The conclusion seems clear that he considered the "construction" to be the "law."

It is submitted that by "construction of the contract" here, is really meant the construction of the act of 1845. The learned justice does not seem to distinguish the two, and from the context we must infer that such was his meaning. Moreover, in no sense can a construction of a contract be said to impair its obligation. If this were conceded, every time a court adjudged a contract void it would impair its obligation. But this is not impairment. In such a case one merely enters into a relation, which he conceives to be a contract, but in which conception he has fallen into error. Mr. Cooley, in his

work on Constitutional Law,[1] says, "no promise or assurance can, therefore, constitute a contract, unless the law lends its sanction." It follows that there can be no impairment of the obligation of the contract, unless there has been a change in the law. In all other cases it is merely a mistaken conception as to what the law is.

We are able to place upon these words of Mr. Justice McLean no construction except this: that the reinterpretation of the act of 1845, by the state court, was a law impairing the obligation of the contract, and it was for that reason that the Supreme Court refused to follow the state decision, which applied that reinterpretation to the case before it.

But however this may have been, there is no question of the attitude of some of the other justices. Mr. Chief Justice Taney, concurring, announces that his opinion is embodied in his opinion delivered in *Ohio Insurance Co.* v. *Debolt*,[2] in which case, as we will show later, he distinctly places his concurrence on the principle we have suggested.

Mr. Justice Catron, dissenting, clearly recognizes the act of 1845, and the contract created under it, to be two separate and distinct things. He adopts the opinion of Mr. Justice Campbell, that *there was, in fact, no contract.* He then goes on to discuss the question of the power of the state to pass exemption laws, and then says: "General principles, however, have little application to the real question before us, which is this: Has the constitution of Ohio withheld from the legislature the authority to grant by contract with individuals the sovereign power, and are we bound to hold her constitution to mean, as her Supreme Court has construed it to mean? If the decisions in Ohio have settled the question in the affirmative, that the sovereign political power is not the subject of an irrepealable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conformity, that I suppose could exist with any one is, that the construction is not settled." He then shows the construction to be settled,

[1] P. 313.

[2] *Supra*, p. 555.

declares it to be his belief that the law is invalid, and that no contract rights were created even it had been, and thus concludes: "But if I am mistaken in both these conclusions, then, I am of opinion, that by the express provisions of the constitution of Ohio, of 1802, the legislature of that state had withheld from its powers the authority to tie up the hands of subsequent legislatures in the exercise of the powers of taxation, and this opinion rests on judicial authority that this court is bound to follow; the Supreme Court of Ohio having held, by various solemn and unanimous decisions, that the political power of taxation was one of those reserved rights intended to be delegated by the people to each successive legislature, and to be exercised alike by every legislature according to the instructions of the people. . . . Whether this construction given to the state constitution is the proper one, is not a subject of inquiry in this court; it belongs exclusively to the state courts, and can no more be questioned by us, than state courts and judges can question our construction of the Constitution of the United States."

This opinion is quoted somewhat at length to show that Mr. Justice Catron draws the distinction contended for. He does not deny the power of the Supreme Court to interpret the contract for itself. He does deny its power to decide as to the validity of the act.

Mr. Justice Daniel concurs with Campbell, who dissents on the ground that there was no contract created by the acceptance of the terms of the act by the bank.

In *Ohio Life Insurance and Trust Co.* v. *Debolt*,[1] Mr. Chief Justice Taney uses the following language (the facts were as to this point identical with *Bank* v. *Knoop*): "This brings me to the question more immediately before the court: Did the constitution of Ohio authorize its legislature, by contract, to exempt this company from its equal share of the public burdens, during the continuance of its charter? The Supreme Court of Ohio in the case before us decided that it did not. But this charter was granted while the constitution of 1802

[1] *Supra*, p. 555.

was in force, and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence. It appears from the acts of the legislature, that the power was repeatedly exercised, while that constitution was in force, and acquiesced in by the people of the state. It was directly and distinctly sanctioned, by the Supreme Court of the state, in the case of the *State* v. *The Commercial Bank of Cincinnati*, 7 Ohio, 125.

"And when the constitution of a state, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive and judicial, I think it must be regarded as the true one. It is true that this court always follows the decisions of the state courts in the construction of their own constitutions and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, *is bound to adopt the construction it received from the state at the time the contract was made.*" The Chief Justice then refers to the case of *Rowan* v. *Runnels*, points out that the principles are the same whether jurisdiction is acquired by virtue of diverse citizenship or by virtue of the subject matter, and continues, "Indeed the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions, which the lapse of time and the change in judicial officers will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government, and ad-

ministered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, *or decisions of its courts altering the construction of the law.*"

Having thus dealt with the argument that the court must accept the state court's judgment as to the unconstitutionality af the statute, Mr. Chief Justice Taney takes up the question of whether, in fact, a contract had been created. He first declares the right of the Supreme Court to examine "the instrument claimed to be a contract," saying, "I proceed, therefore, to examine whether there *is any contract* in the acts of the legislature relied on by the plaintiff in error, which deprives the state of the power of levying upon the stock and property of the company its equal share of the taxes deemed necessary for the support of the government," and after a careful and exhaustive opinion, announces his conclusion that no contract existed, and, on that ground, affirms the judgment.

In this opinion Grier concurs on all points. Catron concurs in the conclusion that no contract had been created; does not dissent from the doctrine that the early interpretation of the act must be followed in cases where the state court has changed its view, but expresses his opinion that the Ohio courts had not previously passed upon the constitutionality of the act.

Justices Daniel and Campbell also concur, while Justices McLean, Wayne, Curtis and Nelson dissent, but none of them attack the principle that the state court must be prevented from impairing the obligation of contracts by changing the interpretation of state statutes.

In interpreting the language of Mr. Chief Justice Taney, where he says the construction so long concurred in must be accepted as the true one, we must remember that the constitution of 1802 was no longer in force, and that no question could arise as to future construction. The later decision could operate only retroactively if at all. This gives his statement its true significance, while otherwise it would appear too broad.

These two decisions have been examined somewhat at

length, in order that there may be no misunderstanding in the further investigation of this line of cases, as to the points they involve. *Bank* v. *Knoop* and *Insurance Co.* v. *Debolt* are authority for the following principles of law:

(1) *When a state legislature passes an act purporting to contain a contract, there are two separate and distinct problems presented.*

(a) *Is the act constitutional?*

(b) *Has a contract been created?*

(2) *The United States Court have the right to examine for themselves whether or not a contract has been created.*

(3) *The United States Court have not the right to examine the interpretation by the state court of the constitutionality (state) of the act, but must accept it as final.*

(4) *The United States Court (having acquired jurisdiction by virtue of the fact that a later act has been passed which would impair the obligation of contracts if there were any), may refuse to apply a decision of a state court, adjudging an act void, in a case where contract rights have been acquired under a former construction by that court, adjudging it valid.*

The last principle, it will be noted, differs only from the conclusions drawn from the class of cases represented by *Gelpcke* v. *Dubuque*, in that in the one case jurisdiction is acquired by virtue of diverse citizenship, in the other, by virtue of the subject matter. The principle, obviously, is the same in each case. In *Farmers' and Mechanics' Bank of Pa.* v. *Smith*,[1] Mr. Chief Justice Marshall made the following very pointed statement, "that this case was not distinguishable from the former decisions of the court on the same point, except by the circumstances that the defendant, in the present case, was a citizen of the same state as the plaintiff, at the time the contract was made in that state, and remained such at the time the suit was commenced in its courts. But these facts made no difference in this case. The Constitution of the United States was made for the whole people of the Union, and is equally binding on all the courts and on all the citizens."

[1] 6 Wheat. 131 (1821), Marshall, C. J.

The cases cited in the note will be found to support the principle, that the Supreme Court of the United States may always construe the contract of the state, when it is alleged that the obligation of that contract has been impaired by subsequent legislation. While most of them do not deal explicitly with the distinction between the act and the contract which it helps to create, the decisions are not inconsistent with this principle.

In *McCullough* v. *The Commonwealth of Virginia*,[1] it is distinctly pointed out. On page 138 Mr. Justice Brewer says; "Neither is the argument a sound one. It ignores the difference between the *statute* and the *contract*, and confuses the two entirely distinct matters of *construction* and *validity*. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes." Of course the question as to the *validity of the act* would arise before either of these.[2]

Lastly we wish to call especial attention to the case of *Pease* v. *Peck*.[3] This case came up by a writ of error to the Circuit Court of Michigan. The question here was not as to the construction of a statute, but as to what the statute in fact was. The statute of limitations, as passed, did not contain a saving clause, excepting persons "beyond seas." Such a clause was inserted in the published copy. For a long period the statute was treated by the courts as containing this provision. A copy of the original act having subsequently been discovered, and the Supreme Court of Michigan having determined that its former treatment of the statute was incorrect, it was urged

[1] 172 U. S. 102 (1898), Brewer, J.

[2] Jefferson Branch Bank *v.* Skelley, 1 Black. 436 (1861); Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116 (1861); University *v.* The People, 99 U. S. 309 (1878), Miller, J.; Louisville & Nashville R. R. *v.* Palmes, 109 U. S. 244 (1883); Louisville Gas Co. *v.* Citizens Gas Co., 115 U. S. 683 (1885), Harlan, J.; Wright *v.* Nagle, 101 U. S. 791; Mobile & Ohio R. R. *v.* Tenn., 153 U. S. 487 (1893), Jackson, J.; Huntingdon *v.* Attrill, 146 U. S. 657; Bryan *v.* The Board of Education, 151 U. S. 639 (1893), Harlan, J.; McCullough *v.* The Com. of Va., 172 U. S. 102 (1898), Brewer, J.

[3] 18 How. 599 (1855), Grier, J.

that the United States Court should apply the latter construction in the case before it. This the court refused to do. The language of Mr. Justice Grier is: "The territorial law in question had been received and acted upon for thirty years, in the words of the published statute. It has received a settled construction by the courts of the United States, as well as of the state. It had entered as an element into the contracts and business of men. On a sudden, a manuscript statute, differing from the known public law, is disinterred from the lumber room of obsolete documents. A new law is promulgated by judicial construction which, by retro-action, destroys vested rights of property of citizens of other states, while it protects the citizens of Michigan from the payment of admitted debts."

This statement, it will be perceived, is very strong. It assumes that a meaning is engrafted into a legislative enactment, that was never there. This is done by means of judicial construction.

Mr. Justice Campbell and Mr. Justice Daniel dissented, but solely on the ground that they did not think it appeared that the Supreme Court of Michigan had ever construed the statute. They expressly admitted the points of law laid down by the court.

It should be noted that Mr. Justice Grier did not deny the right of the Supreme Court of Michigan "to promulgate a new law," but only denied the right of any state court to apply that law to existing contracts. It is submitted that, if this decision be sound, it must follow as a matter of logic, that a court, by its construction, may change a law in fact. Here the law, as passed, did not contain a clause which the courts of Michigan said it did. The Supreme Court of the United States say that during that period, the law *was what the Michigan courts said it was*. This can mean only one thing. The court's declaration changed the law. It is submitted, after this examination of the cases, that, rightly or wrongly, the courts have actually decided,

(1) *Judicial interpretation of state statutes by state courts makes, in fact, a part of the law of the state.*

(2) *A change of judicial interpretation is, in fact, an amendment of the law.*

(3) *When state courts have so applied such an amendment as to impair the obligation of a contract, the federal courts, when they have acquired jurisdiction by virtue of diverse citizenship, will refuse to follow the decision, because to do so would be to apply a "law," (i. e., the altered interpretation, not its application to the contract) which impairs the obligation of contracts, and which is forbidden by the federal constitution.*

Thomas Raeburn White.

(To be continued.)